U.S. Department of Justice

Immigration and Naturalization Service

B4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 25 2000

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[redacted]

Public Copy
Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The petitioner filed a motion to reopen, which the director granted. Upon consideration, the director affirmed his previous decision and denied the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The decision of the director will be withdrawn and the petition will be remanded to the director for further action.

The petitioner is a corporation which claims to be the wholly-owned subsidiary of a company in Pakistan. The petitioner claims to be engaged in the business of importing cloth from Pakistan and further claims to own a pharmacy in New York. It seeks to employ the beneficiary as president. Accordingly, the petitioner endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C). The director determined that the petitioner did not have the ability to pay the offered wage at the time of filing.

On appeal, counsel asserts that the petitioner has sufficient income to pay the proffered salary and that the Service should consider the income of the pharmacy, which is claimed to be a wholly-owned subsidiary of the petitioning corporation.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
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> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for

classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has the ability to pay the proffered wage.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 4, 1998. The beneficiary's salary, as stated in the petitioner's job offer letter, is $45,000 annually.

In his decision, the director stated that the petitioner's 1996 IRS Form 1120, U.S. Corporation Tax Return, revealed that it had gross receipts of $114,712, with a corresponding cost of goods sold at $45,706. The director found that the petitioner had a gross profit of $69,006. The director then deducted the beneficiary's proffered salary from the gross profit, and concluded that the petitioner would then have $24,006 to pay expenses and the salaries of the remaining seven staff members. Based on this finding, the director found that the petitioner did not have sufficient funds to pay the proffered salary.

On motion, the petitioner stated that the director should have considered the income of the petitioner's claimed subsidiary in New York. The IRS Form 1120 of the claimed subsidiary reflects that the company had a gross profit of $119,786. In addition, the petitioner claimed that the tax return and the beneficiary's Form W-2 demonstrate that the salary has been paid to the beneficiary. After the director affirmed his previous decision, the petitioner appealed the decision to the Associate Commissioner and re-asserted these claims.

Upon review, the petitioner's assertions are persuasive in part, and must be rejected in part. In his decision, the director correctly noted that the income of the claimed subsidiary should not be considered as it is a distinct corporate entity, separate from the petitioning corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See* Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Furthermore, it is presumed that any revenue from the claimed subsidiary would already be reflected in the petitioner's tax return.

However, the decision of the director must be withdrawn. In considering the IRS Form 1120 tax return, the director failed to note that the form reflected the compensation of the beneficiary as the president of the company, at a salary of $45,000. *See* 1996 IRS Form 1120, U.S. Corporation Tax Return, line 12 and Schedule E, line 4. As the tax return reflected that the petitioner was actually paying the beneficiary the salary at the time the petition was filed, the petitioner has established that it has the ability to pay the proffered salary.

Accordingly, after a review of the petitioner's federal tax return, it is concluded that the petitioner has established that it had sufficient funds to pay the salary offered at the time of filing of the petition and continuing to present. For this reason, the decision of the director will be withdrawn.

However, the matter will be remanded to the director for further consideration.

Review of the record reveals that the petitioner did not maintain a qualifying relationship with the claimed overseas parent company. In the initial filing, the petitioner submitted a copy of its 1996 IRS Form 1120, which was signed and dated by the tax preparer. This tax return stated that the beneficiary, as president of the company, owned 100 percent of the corporation's issued stock. *See* 1996 IRS Form 1120, U.S. Corporation Tax Return, Schedule E, line 1 (reflecting the signature of the preparer "Maged Fam" and dated November 18, 1997). The tax return also stated that no foreign person owned 25 percent or more of the corporation and that the company was not the subsidiary of any parent company. *See id.* at Schedule K, lines 4 and 10. These statements directly contradict the petitioner's claim that it is the wholly-owned subsidiary of the claimed Pakistani parent corporation.

It is further noted that in response to the director's request for evidence, the petitioner submitted a second copy of the same tax

return. *See* 1996 IRS Form 1120, U.S. Corporation Tax Return (submitted in response to director's request for evidence and reflecting no signature or date). This copy of the tax return was altered so that the above mentioned references to the beneficiary's ownership interest and the lack of foreign ownership had been deleted.[1] Although the petitioner claims that the notations were the result of a clerical error, no evidence was submitted to demonstrate that the petitioner filed an amended tax return. However, as the director did not raise this issue in his decision, it will not be addressed further here. Regardless, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity, as defined at 8 CFR 204.5(j)(2). Although the submitted tax return reflected the payment of the beneficiary's salary, the document also reflected a total of $3,250 paid in salaries and wages to the seven claimed employees. The amount of wages paid to the other employees raises doubt regarding the actual number of the petitioner's claimed staff and leads one to conclude that the beneficiary is the sole employee. In addition, the petitioner has not submitted sufficient evidence, such as payroll records or other objective evidence, to establish that it employs the claimed subordinate staff. Accordingly, the record does not sufficiently demonstrate that the beneficiary manages a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing nonqualifying duties. In addition, the description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity.

Finally, the petitioner has not submitted evidence to establish that it is doing business in a regular, systematic, and continuous

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[1] Based on a comparison of the two tax returns, it appears that the petitioner has submitted falsified tax returns in response to the petitioner's request for evidence. Whether the petition should be denied with a finding of fraud is a determination for the director.

manner, as required by 8 CFR 204.5(j)(3)(i)(D). The petitioner claims to be involved in the import, wholesale, and export of garments, fabrics, and carpets. Although the petitioner has submitted copies of invoices and other documents from the claimed parent company, the petition does not contain any evidence of the petitioner's business activities in the United States. While the petitioner claims to own a second corporation which is doing business as a pharmacy, this business is not the petitioning entity in this matter. As noted previously, a corporation is a separate and distinct legal entity from its owners or stockholders. *See* Matter of M, *supra*. The petitioner in this case appears to be an inactive holding company that is not engaged in the regular, systematic, and continuous provision of goods or services. As noted in the regulations, the mere presence of an agent or office will not suffice to show that a company is doing business. 8 CFR 204.5(j)(2).

As the record does not establish that the petitioner maintains a qualifying relationship with the claimed overseas parent company, or that the beneficiary will function in a managerial or executive capacity, or that the petitioner is doing business, this petition may not be approved. The matter is remanded to the director for entry of a new decision in accordance with the above discussed issues.

ORDER: The decisions of the director, dated August 12, 1998, and May 17, 1999, are withdrawn. The petition is remanded to the director for entry of a new decision in accordance with the foregoing.